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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 LIBRADO ESCOBEDO, ) Case No. SACV 16-00186-JAK (DTB)  
12 Petitioner, )  
13 vs. ) ORDER TO SHOW CAUSE  
14 DEAN BORDERS, Acting )  
15 Warden,<sup>1</sup> )  
16 Respondent. )

17 On February 1, 2016,<sup>2</sup> petitioner filed a Petition for Writ of Habeas Corpus by  
18 a Person in State Custody (“Pet.”) herein, along with supporting exhibits (“Pet.  
19 Exh.”). The Petition purports to be directed to a judgment of conviction sustained by  
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21 <sup>1</sup> Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, and Rule  
22 2(a) of the Rules Governing Section 2254 Cases in the United States District Courts,  
23 Dean Borders, the Acting Warden of California Institute for Men, in Chino,  
24 California, where petitioner currently is incarcerated, is hereby substituted as the  
proper respondent in this case.

25 <sup>2</sup> February 1, 2016 is the signature date and, thus, the earliest date on  
26 which petitioner could have turned the Petition over to the prison authorities for  
27 mailing. Rules Governing Section 2254 Cases in the United States District Courts,  
28 Rule 3(d). See also Huizar v. Carey, 273 F.3d 1220, 1223 (9th Cir. 2001) (holding  
that the prison mailbox rule applies to a habeas petitioner’s state and federal filings).

petitioner in Orange County Superior Court on November 21, 2012, following his guilty plea to allegations of lewd conduct with a child under the age of 14 and oral copulation of a minor under the age of 16. (See Pet. at 2; Pet. Exh. A at 1.) Petitioner was sentenced on December 28, 2012 to a prison term of five years. (Id.) Petitioner did not challenge his conviction on direct appeal. (Pet. at 2.) In the Petition, insofar as the Court can glean, petitioner raises five claims: Trial counsel failed to conduct a proper pre-trial investigation and secure evidence (id. at 5-8); trial counsel failed to move for the exclusion of false evidence (id. at 9-10); trial counsel failed to retain a defense expert (id. at 11-12); trial counsel failed to subpoena the victim to testify (id. at 13-14); and trial counsel failed to present a defense in a timely manner (id. at 15-17).

The Court's initial review of the Petition reveals that it appears to be untimely. Accordingly, on or before **March 25, 2016**, petitioner is ORDERED to show cause in writing (if any he has) why the Court should not recommend that this action be dismissed with prejudice on the ground of untimeliness.<sup>3</sup>

Since this action was filed after the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA") on April 24, 1996, it is subject to the AEDPA's one-year limitation period, as set forth at 28 U.S.C. § 2244(d). See Campbell v. Henry, 614 F.3d 1056, 1058 (9th Cir. 2010). 28 U.S.C. § 2244(d) provides:

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<sup>3</sup> The Ninth Circuit has held that the district court has the authority to raise the statute of limitations issue *sua sponte* when untimeliness is obvious on the face of the petition and to summarily dismiss a petition on that ground pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, so long as the court "provides the petitioner with adequate notice and an opportunity to respond." See Nardi v. Stewart, 354 F.3d 1134, 1141 (9th Cir. 2004); Herbst v. Cook, 260 F.3d 1039, 1042-43 (9th Cir. 2001).

1           (1) A 1-year period of limitation shall apply to an application  
 2           for a writ of habeas corpus by a person in custody pursuant to the  
 3           judgment of a State court. The limitation period shall run from the latest  
 4           of—

5                   (A) the date on which the judgment became final by  
 6                   conclusion of direct review or the expiration of the time for  
 7                   seeking such review;

8                   (B) the date on which the impediment to filing an  
 9                   application created by State action in violation of the Constitution  
 10                  or laws of the United States is removed, if the applicant was  
 11                  prevented from filing by such State action;

12                  (C) the date on which the constitutional right asserted  
 13                  was initially recognized by the Supreme Court, if the right has  
 14                  been newly recognized by the Supreme Court and made  
 15                  retroactively applicable to cases on collateral review; or

16                  (D) the date on which the factual predicate of the claim  
 17                  or claims presented could have been discovered through the  
 18                  exercise of due diligence.

19  
 20           Under California law in effect at the time of petitioner's conviction, an appeal  
 21           had to be filed within 60 days after the rendition of the judgment. See Cal. Ct. R.  
 22           8.308(a). Where the judgment of conviction was entered upon a guilty or nolo  
 23           contendere plea, the defendant was required to file a notice of intended appeal within  
 24           the 60-day period, accompanied by a statement "showing reasonable constitutional,  
 25           jurisdictional, or other grounds going to the legality of the proceedings"; the appeal  
 26           did not become operative unless and until the trial court executed and filed a  
 27           certificate of probable cause for appeal. See Cal. Ct. R. 8.304(b); see also Cal. Penal  
 28           Code § 1237.5. Here, petitioner entered a guilty plea on November 21, 2012, and was

1 sentenced on December 28, 2012. (Pet. at 2.) Since petitioner did not file an appeal,  
2 “the date on which the judgment became final by conclusion of direct review or the  
3 expiration of the time for seeking such review” was February 26, 2013, when  
4 petitioner’s time to file a notice of intended appeal expired. See Mendoza v. Carey,  
5 449 F.3d 1065, 1067 (9th Cir. 2006). Petitioner had one year from that date within  
6 which to file his federal habeas petition.

7 From the face of the Petition, it does not appear that petitioner has a basis for  
8 contending that he is entitled to a later trigger date under § 2244(b)(1)(B). Petitioner  
9 is not contending that he was impeded from filing his federal petition by  
10 unconstitutional state action. Nor does it appear that petitioner has a basis for  
11 contending that he is entitled to a later trigger date under § 2244(b)(1)(C). Moreover,  
12 it is clear that petitioner has no basis for contending that he is entitled to a later  
13 trigger date under § 2244(b)(1)(D). Petitioner was aware of the **factual** predicate of  
14 his claims as of the date he pleaded guilty. See Hasan v. Galaza, 254 F.3d 1150, 1154  
15 n.3 (9th Cir. 2001) (statute of limitations begins to run when a prisoner “knows (or  
16 through diligence could discover) the important facts, not when the prisoner  
17 recognizes their legal significance”).

18 Thus, unless a basis for tolling the statute existed, petitioner’s last day to file  
19 his federal habeas petition was February 26, 2014. The instant Petition was filed  
20 almost two years late.

21 28 U.S.C. § 2244(d)(2) provides:

22 The time during which a properly filed application for State post-  
23 conviction or other collateral review with respect to the pertinent  
24 judgment or claim is pending shall not be counted toward any period of  
25 limitation under this subsection.

26  
27 Here, it appears petitioner filed three collateral challenges to the underlying  
28 judgment of conviction: An Orange County Superior Court habeas petition, Case No.

1 M15749; a California Court of Appeal habeas petition, Case No. G051039; and a  
 2 California Supreme Court habeas petition, Case No. S224940. According to  
 3 petitioner, the petition in Case No. M15749 was constructively filed on June 8, 2014  
 4 and denied on July 10, 2014. Because petitioner filed his first state habeas petition  
 5 challenging the 2012 conviction over three months after the deadline for filing a  
 6 federal habeas petition expired, petitioner is not entitled to any statutory tolling of the  
 7 limitations period under 28 U.S.C. § 2244(d)(2). Once the limitations period lapsed,  
 8 it could not be reinitiated. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003)  
 9 (holding that § 2244(d) “does not permit the reinitiation of the limitations period that  
 10 has ended before the state petition was filed”).

11 In Holland v. Florida, 560 U.S. 631, 634, 130 S. Ct. 2549, 177 L. Ed. 2d 130  
 12 (2010), the Supreme Court held that the timely filing of a habeas petition was not  
 13 jurisdictional, but rather was subject to equitable tolling. If petitioner intends to rely  
 14 on the equitable tolling doctrine for purposes of arguing that his federal habeas  
 15 petition is timely, he will need to include with his Response to this Order to Show  
 16 Cause a declaration under penalty of perjury stating facts showing (1) that he has  
 17 been pursuing his rights diligently, and (2) that some “extraordinary circumstance”  
 18 beyond his control stood in his way and made it impossible for him to file the Petition  
 19 on time. See Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed.  
 20 2d 669 (2005); see also Roy v. Lampert, 465 F.3d 964, 969 (9th Cir. 2006) (as  
 21 amended); Rasberry v. Garcia, 448 F.3d 1150, 1153 (9th Cir. 2006); Spitsyn v.  
 22 Moore, 345 F.3d 796, 799 (9th Cir. 2003) (petitioner must show that “extraordinary  
 23 circumstances” were the proximate cause of his untimeliness).

24  
 25 DATED: February 24, 2016



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 27 DAVID T. BRISTOW  
 28 UNITED STATES MAGISTRATE JUDGE